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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated,	)	No. C-06-00672-VRW
Plaintiffs,	)	CLASS ACTION
vs.	)	PLAINTIFFS' OPPOSITION TO THE MOTION OF DEFENDANT AT&T CORP. TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS
AT&T CORP., et al.	)	Date: May 17, 2006 Time: 10:00 a.m. Courtroom: 6, 17th Floor Judge: Honorable Vaughn R. Walker
Defendants.	)	

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I. INTRODUCTION

Plaintiffs allege that AT&T Corp. and AT&T Inc. (jointly "AT&T" or "defendants") are engaging, with the government, in a massive warrantless surveillance program directed by the National Security Agency ("NSA"). Based upon statements by government officials, plaintiffs further allege that this program of covert, suspicion less surveillance of the communications of millions of people in the United States will continue indefinitely unless enjoined by this Court. This wholesale interception of private communications violates the First and Fourth Amendments of the U.S. Constitution, as well as numerous laws passed by Congress to protect Americans from such unlawful intrusions into their private lives. The importance of this issue cannot be overstated; the protections of the Fourth Amendment against suspicion less searches are fundamental to our scheme of ordered liberty and have been jealously guarded by courts and citizens alike since the Founding. "Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

Accordingly, plaintiffs moved for a preliminary injunction (Dkt. 30) to enjoin defendants' illegal participation in the government's suspicion less searches and seizures. Plaintiffs' motion is supported by, among other things, the declarations of Mark Klein (a retired AT&T employee) ("Klein Decl.") (Dkt. 31) and J. Scott Marcus (formerly Senior Advisor for Internet Technology to the Federal Communications Commission) (Dkt. 32), and copies of three AT&T documents reviewed by Mr. Klein in the course of his employment at AT&T. The motion, the two declarations, and the three documents were all lodged with the Court pending its decision whether they should be available to the public.

AT&T has moved to have all these documents sealed. *See* Motion of Defendant AT&T Corp. to File Documents Under Seal ("Mot. to Seal") (Dkt. 38). In addition, AT&T has moved the Court to compel plaintiffs to return all copies of the three AT&T documents to AT&T, arguing that the documents evidencing their unlawful conduct are proprietary and protected by a confidentiality agreement, and were improperly obtained by plaintiffs. *See* Motion of Defendant AT&T Corp. to Compel Return of Confidential Documents ("Mot. to Compel" or "Motion to Compel") (Dkt. 41).

The Court should deny AT&T's Motion to Compel, which seeks to prevent this Court from considering the evidence in the Klein and Marcus declarations that supports plaintiffs' motion and to obstruct plaintiffs from establishing defendants' ongoing violations of constitutional and statutory law. None of AT&T's arguments or authority provides any basis for striking evidence or compelling the return of the three documents.[1]

The documents at issue are properly before the Court. Mr. Klein obtained the documents before his retirement from AT&T in May 2004, more than a year and a half before this litigation began. They were not obtained or retained in anticipation of this litigation, nor did Mr. Klein obtain them at the behest of plaintiffs or their counsel. Given the timing – of the acquisition of the documents, the publication of the NSA wiretapping story, and the start of this litigation – there is no rational argument that the acquisition of the documents from AT&T circumvented the discovery process.

AT&T's arguments that Mr. Klein acted wrongfully in acquiring the documents and providing them to plaintiffs are irrelevant here. Mr. Klein is not a party to this action. This litigation alleges the violation of the fundamental constitutional rights of millions of Americans by deliberate government policy, facilitated by defendants; it is not a dispute over private contractual and statutory rights between Mr. Klein and AT&T. Even if a confidentiality agreement arguably was violated, plaintiffs are not parties to that agreement and cannot be bound by a contract they never entered and which they did not even see until AT&T filed its motion. *See* Russell Declaration, Ex. A (Dkt. 42).

The Court should not, in any event, enforce a confidentiality agreement to conceal AT&T's criminal wrongdoing in a matter of significant public concern. Moreover, the First Amendment fully protects plaintiffs' right to have meaningful access to courts to put an end to the massive violation of constitutional rights; attempting to prevent the use of legally acquired documents in the pursuit of this goal is itself a misuse of the legal system that should not be permitted. The Court should not allow AT&T to hide away evidence of its unlawful conduct behind flimsy claims of confidentiality agreements and trade secrets.

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[1] AT&T relies on the Declaration of James W. Russell ("Russell Declaration") (Dkt. 42) in support of both this motion and its separate motion to file documents under seal (Dkt. 38). In connection with that motion, plaintiffs filed written evidentiary objections to the Russell Declaration (Dkt. 63). Plaintiffs incorporate those objections here by reference, and respectfully request that the Court rule on them prior to considering the two motions.

II. ARGUMENT

The law here can be simply stated. Parties to litigation have a right to engage in independent factual investigation outside of discovery, including the gathering of documents. The forced return of documents may be appropriate only in very limited circumstances: when the documents were wrongfully taken from defendants by a plaintiff or its agents for use in planned or pending litigation. In such cases, a few courts have found that the plaintiff thus circumvented the discovery process. Even when such circumstances exist, which they do not here, countervailing interests, particularly the First Amendment, counsel against the suppression of evidence.

Accordingly, defendants' Motion to Compel the return of certain documents is based on two fallacies. First, they argue – with no basis whatever – that plaintiffs wrongfully obtained the documents at issue. Second, they argue, based upon their argument that plaintiffs wrongfully obtained the documents, that the Court should order the documents to be returned. Defendants are wrong, both legally and factually.

A. Documents May Be Obtained Through Independent Investigation

Plaintiffs are entitled to search for evidence outside the formal discovery process. *See L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 933 (9th Cir. 2002). That evidence is obtained outside the discovery process generally does not restrict its use in litigation. *Id*. In fact, the First Amendment limits a trial court's ability to restrict the disclosure of documents "gained through means independent of the court's processes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *see also Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1081 (9th Cir. 1988) (district court lacks the power to compel the return of documents not obtained in discovery in the case before it); *George v. Indus. Maint. Corp*., 305 F. Supp. 2d 537, 542 (D.V.I. 2002) (limiting the use in the litigation of documents obtained outside the discovery process on the basis of relevance only, and stating that "the court lacks authority under the penumbra of this case to restrict other usage" of non-discovery documents); *Stamy v. Packer*, 138 F.R.D. 412, 417 (D.N.J. 1990) (a court's "order that prohibits disclosure of information obtained outside the court processes amounts to a prior restraint of one's freedom of speech" and is, therefore, inherently suspect).

Attorneys have, not just a right, but "a duty prior to filing a complaint . . . to conduct a reasonable factual investigation." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). The right to engage in independent investigation includes contacts with former employees; "prohibiting attorneys from contacting an opponent's former employees would unfairly hinder litigants from investigating and pursuing factual evidence relevant to their case." *In re EXDS, Inc.*, No. C05-0787 PVT, 2005 WL 2043020, at *3 (N.D. Cal. Aug. 24, 2005) (citation omitted).

In some instances, courts will not even entertain cases without documentary evidence that has, by definition, come to the plaintiff through channels other than formal discovery. *See, e.g., In re Silicon Graphics Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999) (dismissing a claim under a heightened pleading standard of the Private Securities Litigation Reform Act in part because plaintiffs did not have adequate information about the defendant company's internal documents).

As explained by the Second Circuit, "Rule 26 . . . is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes." *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 944-945 (2d Cir. 1983) (emphasis in the original) (citations omitted). Even where a non-party to the litigation has breached a contract by providing documents to a party, the non-party's actions provide no basis for prohibiting the use of the documents by the party who innocently receives them, let alone for ordering their return. *Schlaifer Nance & Co. v. Estate of Warhol*, 742 F. Supp. 165, 166 (S.D.N.Y. 1990).

1. Plaintiffs and Plaintiffs' Counsel Acted Properly

AT&T argues that the documents should be returned under the Court's inherent authority to control the integrity of judicial proceedings, but neither the law nor the facts support this argument. In fact, AT&T's main authorities stand only for the proposition that return of documents may be appropriate when the documents were wrongfully taken by a party or its agents, while litigation was pending or planned.

The facts relating to how the documents were obtained are that Mr. Klein reviewed the contested documents in the course of his employment with AT&T and that he left AT&T in May 2004. Klein Decl., ¶¶6, 25, 28. A year and a half later, following the publication of the story that the NSA was illegally wiretapping electronic communications without a warrant, Mr. Klein contacted EFF for the first time. Declaration of Kevin Bankston in Support of Plaintiffs' Opposition to the Motion of Defendant AT&T Corp. to Compel Return of Confidential Documents ("Bankston Decl."), ¶¶2, 9. He told EFF what he knew of defendants' involvement with the NSA and the wiretapping capabilities, and showed EFF excerpts of the documents he had in his possession. *Id.*, ¶¶4-6. Following the filing of the complaint, Mr. Klein gave EFF copies of the documents in the form lodged with the Court. *Id.*, ¶7. There is nothing improper in either Mr. Klein's or plaintiffs' receipt of the documents.[2]

AT&T throws around the terms burglarized, converted, and "surreptitiously obtained," but acknowledges that Mr. Klein's access to the documents was "in the course of his employment with AT&T." *See* Mot. to Compel at v n.1, 1, 3, 4, 7, 9, 11. There is no suggestion that Mr. Klein acted at plaintiffs' behest. Nor is there any basis for thinking that plaintiffs acted wrongfully in accepting documents that Mr. Klein offered them.

a. There Was No Discovery Process to Circumvent When Mr. Klein Acquired the Documents.

At the time Mr. Klein acquired the documents, there was no litigation pending or planned. He could not, therefore, have been circumventing any discovery process, as there was no discovery or other process in place. *See Bridge C.A.T. Scan*, 710 F.2d at 944-45; Mot. to Compel at 1. The

[2] Defendants baselessly assert numerous wrongs on Mr. Klein's part. For example, defendants assert that Mr. Klein converted the documents. Mot. to Compel at v n.1, 9. There is no conversion under California law if the proper owner is not deprived of use of the documents. Thus, when copies – as opposed to originals – are taken, there is no conversion. *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 305 (7th Cir. 1990) (applying California law, finding that the taking of copies, rather than originals was not conversion as the owner was not deprived of use of the documents). Here, there is no reason to believe the documents Mr. Klein received were originals rather than copies.

acquisition of the AT&T documents outside the discovery process does not impact plaintiffs' ability to use them. *L.A. New*, 305 F.3d at 933.

None of defendants' cases hold otherwise. Defendants' cases involve situations where the plaintiff or its agent took documents from defendants while litigation was planned or already pending. Most of the cases cited involve a plaintiff who engaged in "self-help evidence gathering by employees for use in contemplated litigation against their soon-to-be former employers." *Pillsbury, Madison & Sutro v. Schectman*, 55 Cal. App. 4th 1279, 1287 (Cal. App. 1st Dist. 1997); *see also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 758 (9th Cir. 1996) (employee took documents from employer for use in a wrongful termination case against his employer); *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 321-322 (S.D.N.Y. 1997) (employee copied employer's computer files for use in wrongful termination case against his employer); *Furnish v. Merlo*, Civ. No. 93-1052-AS, 1994 U.S. Dist. LEXIS 8455 (D. Or. June 8, 1994) (involving employee who took documents for use in an employment discrimination case against her employer); *Conn v. Superior Court*, 196 Cal. App. 3d 774, 777-78 (Ct. App. 2d 1987) (involving employee who, believing he was being constructively discharged, took documents for use in wrongful termination case against his employer). The *Pillsbury, Madison & Sutro* court put particular emphasis on its concerns about "self-help" by a "litigant or potential litigant." 55 Cal. App. 4th at 1289.

Defendants' remaining cases involve cases that were already in discovery at the time the documents were taken from defendants. *See In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992); *Smith v. Armour Pharmaceuticals Co*., 838 F. Supp. 1573, 1578 (S.D. Fla. 1993). In *Adams*, the plaintiffs had a means of obtaining the documents: discovery. Yet, they took the documents and did not disclose that they had them, thereby, according to the district court, gaining an "unfair advantage." 143 F.R.D. at 108. Similarly, the plaintiffs in Smith obtained a privileged document from defendants not through ordinary discovery channels, although discovery was underway. *Smith*, 838 F. Supp. at 1575. Defendants in *Smith* did not know that the plaintiffs had the document, and believed it was adequately protected from use or dissemination pursuant to a stipulation in a different action, but counsel – representing plaintiffs in two separate but related actions – surreptitiously used it anyway. *Id*. These cases stand only for the proposition that once there is a discovery process, parties should not affirmatively misrepresent or conceal what they have obtained from defendants.

Additionally, several of defendants' cases involve a party gathering or retaining information that was clearly not discoverable. *See Furnish*, 1994 U.S. Dist. LEXIS 8455, at **2-3 (involving the wrongful taking of a memorandum identified as "attorney-client privileged"); *Conn*, 196 Cal. App. 3d at 777-83 (involving refusal to return privileged documents); *McCafferty's, Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 165-66 (D. Md. 1998) (involving the taking and reconstruction of privileged documents that had been torn into 16 pieces prior to being thrown away); *Smith*, 838 F. Supp. at 1575-76 (involving refusal to return inadvertently produced privileged documents).

In this case, Mr. Klein had the documents prior to leaving AT&T in May 2004. Klein Decl., ¶¶6, 25, 28. He did not give them to plaintiffs until 2006. Bankston Decl., ¶¶2, 5, 7. He is not a plaintiff in this action and he has not sued AT&T. There is no aspect of "self-help discovery" here. Further, there was no pending or planned litigation when he acquired the documents, and thus there was no discovery process to be circumvented. Nor are the documents at issue even arguably privileged, and AT&T has not asserted any privilege over them.

b. Plaintiffs Obtained the Documents Innocently

Plaintiffs' first contact with Mr. Klein and first awareness of the documents, was when Mr. Klein walked into the office of Electronic Frontier Foundation ("EFF") in January 2006 to provide information regarding his work at AT&T and excerpts of the documents at issue here. Bankston Decl., ¶¶2-7. The receipt of evidence from a witness is not improper; it is ordinary case investigation. Absent evidence of wrongdoing by a party, a court generally has no power to prohibit dissemination of even confidential information "if that information has been gathered independently of judicial processes." *Bridge C.A.T. Scan Assocs.*, 710 F.2d at 946-47.

Defendants' cases are inapplicable because they involve clear wrongdoing by the plaintiff or plaintiff's counsel. For example, in *Furnish*, the employee, in the final days before her termination, and possibly shortly thereafter, unlocked her boss' desk, photo-copied a memorandum marked "attorney-client privileged" discussing reasons for terminating her that she found in her boss' desk, and copied other documents from files that were not her own. *Furnish*, 1994 U.S. Dist. LEXIS

8455, at **2-3. The facts of the taking of documents in *Pillsbury, Madison & Sutro* are not in the opinion, but the court noted that they "most closely resemble *Furnish v. Merlo*." *Pillsbury, Madison & Sutro,* 55 Cal. App. 4th at 1287. Similarly, in *O'Day*, the plaintiff, following the denial of a requested promotion, came back to his office after business hours and obtained evidence of what he considered to be actionable age discrimination by "rummaging through his supervisor's desk." *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 758 (9th Cir. 1996). In *Fayemi*, the plaintiff, after being told not to return to work, went to his boss' office on a Sunday morning and printed off confidential compensation documents from his boss' computer. *Fayemi*, 174. F.R.D. at 322-23. In *Smith,* an attorney received a privileged document in one case, stipulated not to use it or disseminate it, and then used it in a different case. 838 F.Supp. at 1575. In *Adams*, the attorney used documents in developing his case but then refused to identify what the documents were when directly asked to do so in an interrogatory. 143 F.R.D. at 107.

Here, plaintiffs and plaintiffs' counsel are not accused of any wrongdoing. AT&T admits that plaintiffs did not "break[] into AT&T and convert[] the documents." Mot. to Compel at 9. The only purported wrong defendants argue that plaintiffs or their counsel have committed is accepting documents provided by someone that defendants claim acted improperly. *Id*. Contrary to defendants' argument, plaintiffs' innocent receipt of the documents does indeed change the analysis. *See George*, 305 F. Supp. 2d at 540-41 ("a crucial difference between those cases and the instant one is that, in those cases, the documents were wrongfully procured by the plaintiff or the attorney"); *Schlaife*, 742 F. Supp. at 166. Indeed, the *Fayemi* court specifically found the plaintiff's wrongful conduct in acquiring the information was, along with First Amendment concerns, the relevant distinction between *Fayemi* and *Bridge C.A.T. Scan Associates*, in which plaintiffs were not compelled to return documents. *Fayemi*, 174 F.R.D. at 324-25. Plaintiffs' receipt of documents from a witness is not a sufficient basis for the extraordinary relief of suppressing evidence relevant to the case.

Finally, even where documents are improperly obtained by a party, the party need not return all copies of the documents when the First Amendment is implicated. *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 305 (7th Cir. 1990) ("in the name of the First Amendment," allowing ABC to keep and disseminate FMC's documents that ABC had converted); *EXDS*, 2005 WL 2043030, at *10 (return of documents not appropriate when, among other things, documents were copies, not originals). The First Amendment protection of the dissemination and use of documents is not limited to the media. *Bridge C.A.T. Scan Assocs.*, 710 F.2d at 946. As discussed in greater detail below, litigation to vindicate constitutional rights – such as this litigation – is entitled to the fullest protection of the First Amendment. *In re Primus,* 436 U.S. 412, 424 (1978).

c. AT&T's Confidentiality Agreement with Non-Party Klein Cannot Be Used to Conceal AT&T's Criminal Conduct

Defendants object to Mr. Klein's acquisition or disclosure of the documents, saying that he was bound by a confidentiality agreement.[3] But Mr. Klein is not a party to this litigation; he is merely a witness. And plaintiffs are not parties to the purported confidentiality agreement, and they cannot be bound by confidentiality provisions of a contract they did not enter and whose terms they did not know until AT&T filed its motion. Plaintiffs did not induce Mr. Klein's actions, neither his acquisition of the documents nor his provision of them to plaintiffs. *See Schlaifer*, 742 F. Supp. at 166, (citing *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 156-57 (2d Cir.1949)) ("Having acquired the secrets innocently, they were entitled to exploit them till they learned that they had induced the breach of the contract."). Plaintiffs and plaintiffs' counsel did not know Mr. Klein until more than a year and a half after he acquired the documents, and Mr. Klein initiated the contact. *See* Bankston Decl., ¶¶2-9. There is, in short, no reason to find that Mr. Klein's wrong, if any, taints plaintiffs' possession and use of the documents.

More importantly, the confidentiality agreement should be deemed unenforceable in circumstances like that of this litigation. Where an employer seeks to cover up its own wrongs through the enforcement of a confidentiality agreement, courts "'are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public – as distinct from trade secrets or other legitimately confidential information – may be involved.'" *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1136 (N.D. Cal. 2002) (quoting *McGrane v. The Reader's Digest Assoc., Inc.*, 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993). Indeed, "[d]isclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees." *Id.* (citation omitted)*; see also Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 444 (S.D.N.Y. 1995) ("it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law").

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[3] AT&T falsely asserts that Mr. Klein disclosed "matters that he filed in this Court under seal." Mot. to Compel at v n.1. Mr. Klein is not a party and has not filed anything in this Court, let alone under seal.

Plaintiffs have alleged that defendants assisted the NSA in eavesdropping, without a warrant, on millions of private communications. The documents AT&T claims are protected by its purported confidentiality agreement with Mr. Klein are evidence of this massive constitutional violation. The Court should not allow a confidentiality agreement, particularly one with a non-party, to prevent public scrutiny of such criminal conduct.

B. The First Amendment Supports Plaintiffs' Use of the AT&T Documents.

Civil litigation, particularly public-interest litigation, is protected by the First Amendment. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963); *Primus*, 436 U.S. 412. In *Button*, the Supreme Court held that "the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." 371 U.S. at 429 (citations omitted). The Court held that litigation is not merely "a technique of resolving private differences" for the public interest organizations like the NAACP; rather it is a "means for achieving the lawful objectives" and "a form of political expression" that may well be "the sole practicable avenue open to a minority to petition for redress of grievances." 371 U.S. at 429, 435-37 (holding that right to expression includes right to persuade others through litigation). By organizing around certain specific expressive goals, such as vindicating constitutional rights through litigation, public interest organizations make a "distinctive contribution . . . to the ideas and beliefs of our society." *Id.* at 430-31 (refusing to "subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly").

The Supreme Court subsequently recognized that "'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."' *Primus*, 436 U.S. at 426 (citations omitted). The Court again held that vindicating constitutional rights through litigation is "a form of political expression" and "'political association.'" *Id*. at 428 (citation omitted). The right to pursue redress for violations of constitutional rights "comes within the generous zone of the First Amendment protection reserved for associational freedoms." *Id*. at 424.

These core First Amendment principles apply here as well. Plaintiffs brought this case in order to protect the public and its ability to communicate without fear of unlawful and unconstitutional surveillance, rights protected by the Constitution, recognized by the Supreme Court, and implemented by Congress in the federal wiretap statute. The documents lodged with the Court are significant evidence of a wrong being carried out by defendants and the government – a wrong that defendants and the government seek to conceal from the public. Plaintiffs seek to bring the judicial branch's critical attention to bear on AT&T's continuing illegal and unconstitutional actions.

Further, contrary to AT&T's assertion, the fact that this litigation is a suit for, among other things, money damages, does not lessen the public-interest aspect of this case or its protection under the First Amendment. *See Primus*, 436 U.S. at 428 ("We find equally unpersuasive any suggestion that the level of constitutional scrutiny in this case should be lowered because of a possible benefit to the ACLU."). The size of the damages sought is determined statutorily, in increments of $100 or $1000 per violation. Amended Complaint for Damages, Declaratory and Injunctive Relief, ¶¶99, 109, 118, 125, 132. AT&T's assertion that damages are in the "trillions of dollars" is a function only of the enormity of the statutory and constitutional violations defendants are committing. *See* Mot. to Compel at 10.

Plaintiffs' public discussion of the case and of the fact that documents have been sealed – though not the contents of the sealed documents – is, as recognized by the Supreme Court in *Primus*, activity that is protected by the First Amendment. *Primus*, 436 U.S. at 424. While AT&T would undoubtedly prefer that the public not understand the scope of its participation in the government's unconstitutional domestic wiretapping, the public has a right to this information and the plaintiffs have a right to disseminate it. *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (finding that a witness could not, under the First Amendment, be prevented from disseminating information obtained outside of discovery relating to alleged governmental misconduct).

Litigation in pursuit of respect for constitutional rights is a fully protected First Amendment right. The use of evidence is necessary to make the access to the court meaningful. Defendants cannot evade the questions of their culpability in the widespread violation of constitutional rights by claiming that documents were obtained outside the formal discovery procedures.

C. AT&T Is Attempting to Use the Court to Enforce a Contract to Shield Its Illegal Conduct from Public Scrutiny

AT&T seeks to have the Court order the return of the documents, based upon a boilerplate confidentiality agreement it requires departing employees to sign, in order to obstruct plaintiffs' efforts to obtain justice. Plaintiffs allege that AT&T is helping the NSA eavesdrop on massive quantities of private communications in violation of the First and Fourth Amendments and numerous statutes. A significant part of the basis for the allegations is the declaration of Mr. Klein and the documents provided by him to plaintiffs. AT&T's clear object is to conceal critical evidence of its civil and criminal violation of the rights of millions of Americans.

One who seeks equitable relief must do so with "clean hands." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). A court acting in equity is "a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a ***refusal on [the court's] part to be 'the abettor of iniquity***.'" *Id.* (citation omitted). Where, as here, public interests are at issue, the doctrine of unclean hands "not only prevents a wrongdoer from enjoying the fruits of his transgression but ***averts an injury to the public***." *Id*. at 815. The court must not allow a party with unclean hands to use contract law to recoup what it has lost by enforcing a contract that violates public policy and enables criminal activity. *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, 182 F.2d 489, 492 (9th Cir. 1950). While a confidentiality agreement does not necessarily violate public policy, it does where it is used to cover up wrongdoing. *See JDS Uniphase*, 238 F. Supp. 2d at 1136.

Plaintiffs have moved for a preliminary injunction to stop AT&T from violating the Fourth Amendment and the federal Wiretap Act, 18 U.S.C. §§2510, *et seq.*, by providing the government with direct access to the domestic and international Internet communications of millions of its customers.

The government has admitted that the NSA is conducting covert, warrantless surveillance of communications of people in the United States. The three documents that AT&T seeks to suppress, along with the Klein and Marcus Declarations (Dkts. 31–32), demonstrate that defendants have given the NSA direct access to its domestic telecommunications facilities so that it may engage in massive, general surveillance of private Internet communication of plaintiffs and potentially millions of Americans.

To allow AT&T to use a confidentiality agreement to suppress evidence of its illegal and unconstitutional wiretapping would be to become an "'abettor of iniquity.'" *Precision*, 324 U.S. at 814 (citation omitted). The court should not allow AT&T to use its confidentiality agreement with a non-party to suppress evidence of defendants' criminal misconduct.

D. AT&T's Concerns About Trade Secrets Can Be Adequately Addressed Through the Ordinary Rule 79-5 Procedures

AT&T argues that the possibility of revelation of its trade secrets justifies the extraordinary measure of compelling the return of its documents. Mot. to Compel at 7-8. But the protection of trade secrets and similar confidential materials is precisely what the lodging and sealing procedures of Rule 79-5(d) were established to accomplish. And plaintiffs have taken great care to ensure that potentially confidential information within plaintiffs' control did not reach the public prior to the Court's decision on whether it should be sealed. Plaintiffs disclosed their possession of the documents to defendants before lodging the documents with this Court under Local Rule 79-5(d), and promptly gave copies to both defendants and the Government. Although plaintiffs do not believe the documents are sealable, they lodged the documents with this Court so that it can decide the proper handling of the information.

Plaintiffs have discussed the case with the media, mentioning the existence of the sealed documents, but have not disclosed the non-public information about which defendants, through the

Russell Declaration, express concern. Defendants do not assert otherwise, nor can defendants point to any rule or law that – in letter or spirit – requires plaintiffs not to disclose the fact that documents have been filed under seal. Instead, defendants cite to cases where a party directly violated court orders not to disclose confidential information. *See Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 965 (9th Cir. 2004) (affirming district court's finding that party violated court order restricting disclosure of confidential information to attorneys to the parties); *Hi-Tek Bags. v. Bobtron Int'l, Inc.*, 144 F.R.D. 379, 380 (C.D. Cal. 1993), *vacated*, 887 F. Supp. 230 (C.D. Cal. 1993) (involving violation of court order authorizing dissemination only to "plaintiff, counsel's in-firm staff, and to court reporters"); *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282, 290 (5th Cir. 2002) (involving violations of three protective orders by quoting confidential documents).

Here, there are no court orders in place, nor have plaintiffs disclosed any of what defendants claim is confidential information. Defendants simply object to plaintiffs having made public the existence of (1) a "confidentiality issue" and (2) sealed documents. Mot. to Compel at 7. There is nothing objectionable in this. Defendants, like plaintiffs, have publicly filed notices that documents are being filed under seal. *See, e.g.*, Notice of Manual Filing of James W. Russell, Dkt. 42. Indeed, court rules require that the public be informed when a party seeks to seal a document. *See* Local Rule 79-5(b) (1) & (c) (1) (requiring that the party seeking to lodge a document under seal file an administrative motion to that effect).

Even if the court finds that the documents contain trade secrets, the court retains the ability to find that the documents should not be concealed from the public in this lawsuit. This case implicates important public policy issues beyond the ordinary lawsuit. Plaintiffs are defendants' customers, entitled to basic privacy in their phone conversations and their use of the Internet. *See* U.S. CONST. amends. I and IV; *Katz v. United States*, 386 U.S. 954 (1967); 18 U.S.C. §§2511, *et seq.*; 50 U.S.C. §§1801, *et seq.*; 47 U.S.C. §222; 47 U.S.C. §605; 18 U.S.C. §2702; 18 U.S.C. §§3121, *et seq.* Trade-secret law recognizes that "the disclosure of another's trade secret for purposes other than commercial exploitation may implicate the interest in freedom of expression or advance another significant public interest." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §40 (1995). The right to '"disclose or use another's trade secret may arise from the other's . . . conduct on his part by which he is estopped from complaining. A privilege to disclose may also be given by the law, independently of the other's consent, in order to promote some public interest.'" *System Operations, Inc. v. Scientific Games Development Corp.*, 425 F. Supp. 130, 136 (D.N.J. 1977) (quoting RESTATEMENT OF TORTS, §757, comment *d* at 9 (1939)) (emphasis in original). Defendants' conduct in assisting the government in violating the First and Fourth Amendment rights, as well as numerous statutorily created rights, of millions of Americans falls squarely within this carve-out to the protection of trade secrets.

Against this important interest, AT&T raises only the specter of harm – harm only vaguely described by Mr. Russell and which has not occurred during Mr. Klein's already long possession of the documents. The courts have long recognized that "[t]he fundamental basis upon which all rules of evidence must rest – if they are to rest upon reason – is their adaptation to the successful development of the truth." *Funk v. United States*, 290 U.S. 371, 381 (1933). Given the heavy burden that they place on the search for truth, "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando*, 441 U.S. 153, 175 (1979); *see United States v. Nixon*, 418 U.S. 683, 708-710 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . "). Thus, courts construe the scope of such privileges narrowly. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). AT&T simply has not shown that depriving the plaintiffs of the use of these documents will serve a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citations omitted).

Moreover, AT&T has failed to show how the procedures under Local Rule 79-5 fail to adequately protect any confidential information while the case proceeds. This Court deals with hundreds of cases every year that involve proprietary trade secrets and technical information used to prove legal violations between competitors. In those cases the Court typically protects this information under Local Rule 79-5 and via an appropriate protective order. The same procedures should apply to any specific portion of the documents the Court deems confidential here, especially in light of the fact that plaintiffs and their counsel do not compete with AT&T in the field of telecommunication services but rather seek redress for AT&T's illegal conduct. Defendants have had the opportunity to show the Court what facts contained within the documents they consider to be truly confidential and deserving of concealment from the public and have refused to provide any of the "narrow tailoring" required by Local Rule 79-5. *See* Defendant AT&T Corp.'s Memorandum in Support of Filing Documents Under Seal (Dkt. 51). Yet properly applied sealing procedures and argument are the appropriate avenue for dealing with questions of whether information should be kept from public scrutiny.

E. The Relief Sought by AT&T Is Futile

AT&T seeks an Order compelling plaintiffs to return all of plaintiffs' copies of the three documents to AT&T and to exclude all references to them, including those in plaintiffs' preliminary injunction motion and the Klein and Marcus declarations, from this action until the documents can be obtained through discovery.

As a practical matter, such an order will serve no legitimate purpose and will needlessly delay plaintiffs' attempts to seek preliminary relief. The documents are likely to lead to the discovery of other admissible evidence and are not privileged, and thus are plainly subject to discovery under the federal rules. Fed. R. Civ. Proc. 26(b)(1). If the Court were to grant AT&T's motion, plaintiffs would seek them again immediately through formal discovery. *See EXDS*, 2005 WL 2043030, at *10 ("requiring Defense counsel to turn over the documents would only create unnecessary work for all concerned, since Defendants would be entitled to seek production of the documents to the extent the information is relevant to this action").

Moreover, as recognized by AT&T, plaintiffs do not possess or control all copies of the documents. Mr. Klein has the documents. He has given documents to the *New York Times*. According to an article in the *New York Times*, the newspaper gave Mr. Klein's documents to its experts. Mot. to Compel at 7; Ex. I to the declaration of Bruce Ericson in Support of Defendant AT&T Corp.'s Motion to Compel Return of Confidential Documents (Dkt. 39). Plaintiffs do not know whether the documents Mr. Klein provided to the *New York Times* are the same documents provided to plaintiffs. Assuming they are the same documents, even if the Court were to order plaintiffs to return the documents, AT&T would still not control all copies of the documents. Mr.

Klein, the *New York Times* and the *New York Times*' experts are not before the Court and the Court, thus, has no authority within the scope of this litigation to order them to return the documents. *See Kirshner*, 842 F.2d at 1081 (court cannot compel return of documents in discovery obtained in a separate action); *George*, 305 F. Supp. 2d at 542 (court has no authority to limit the use outside of litigation of documents not obtained through discovery); *Stamy*, 138 F.R.D. at 417 (First Amendment protects use of documents not obtained through the discovery process). If AT&T were to seek the return of the documents from the *New York Times*, a court could not order their return without violating the First Amendment. *FMC*, 915 F.2d at 305. Thus, contrary to AT&T's assertion, the relief sought through its motion cannot accomplish its goal of returning AT&T to the position it would be in if Mr. Klein had not acquired the documents and eventually shown them to plaintiffs. Because of the futility of defendant's request and AT&T's failure to adequately safeguard the confidentiality of these documents, this Court should deny AT&T's motion.

III. CONCLUSION

For the foregoing reasons, the Motion of Defendant AT&T Corp. to Compel Return of Confidential Documents should be denied.

DATED: May 1, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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